A NEW GENERATION OF INTERNATIONAL ADJUDICATION

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I. The “Proliferation of International Courts and Tribunals” [FN2]

A wide variety of international courts and tribunals have developed during the past century. The emergence of these various methods of adjudicating international disputes is a marked change from earlier eras [FN3] and has rightly been described as one of the most significant developments in international law during the twentieth century. [FN4] This phenomenon has prompted an extensive body of academic commentary, variously addressing the “[p]roliferation of [i]nternational [c]ourts and [t]ribunals,” [FN5] the growth of “supranational adjudication,” [FN6] and the increasing resort to “international tribunals.” [FN7]

This academic commentary has defined international adjudication broadly as encompassing any form of adjudicatory or quasi-adjudicatory process in which states participate in resolving *783 international disputes—including litigation, arbitration, conciliation, mediation, and advisory reports. Representative of this definition is the Project on International Courts and Tribunals (PICT), which catalogues some ninety international judicial bodies and courts, arbitral institutions, and other quasi-adjudicatory mechanisms. [FN8] Other commentators define international adjudication equally expansively, referring to permanent international judicial bodies, such as the ICJ or ITLOS; arbitral or other tribunals established to resolve specific disputes or categories of disputes, such as the Iran-U.S. Claims Tribunal or individual PCA arbitral tribunals; and national courts hearing international disputes. [FN9]

*784 This definitional approach is unsurprising and correct. Different forms of international adjudicatory mechanisms, ranging from permanent courts to ad hoc arbitral tribunals to hybrid bodies, perform the same types of functions—dispute resolution, interpretation and articulation of legal rules, and review of government actions— involving the same sets of legal instruments and rules. [FN10] Not surprisingly, the same or very similar categories of disputes can be submitted to and resolved by two or more very different types of adjudicatory bodies. [FN11] In assessing the field of international adjudication and the design of future international tribunals, it is both appropriate and necessary to consider all of these different adjudicatory mechanisms, regardless of their particular forms or structures.

*785 Commentators on the field of international adjudication all share a common starting point, before proceeding to diverge widely in their assessments of existing mechanisms for international adjudication and prescriptions for future tribunals. The conventional wisdom is that, in stark contrast to domestic courts in developed states, existing international tribunals lack both mandatory jurisdiction and the authority to render enforceable decisions. Instead, almost all commentators agree that contemporary international tribunals merely provide information to states to enable them better to monitor and induce compliance with international obligations through the use of retaliation, reciprocity, and reputational considerations and to
influence domestic constituencies, such as courts and advocacy groups. [FN12]

On the one hand, from a perspective of deep skepticism about the efficacy of international adjudication, and international law more generally, [FN13] commentators such as Professors Eric Posner and John Yoo underscore the lack of mandatory jurisdiction in international adjudication. These commentators start from the premise that “[i]nternational adjudication, however impressive in outward appearance, lacks an essential feature of adjudication that occurs within states: . . . mandatory jurisdiction.” [FN14] They observe that

[i]he founders of the [ICJ] sought to create a type of “mandatory” jurisdiction by giving states the option to submit to any claims brought against them, or a subset of those claims, or claims associated with particular treaties. But states can, and frequently have, withdrawn from jurisdiction when it has served their *786 interests--and, unlike the domestic case, no one has found a way to prevent states from doing this. [FN15]

On the other hand, commentators with fundamentally different views regarding international adjudication--notably, Professors Anne-Marie Slaughter, Laurence Helfer, and other proponents of international adjudication [FN16]--share the premise that “international dispute resolution tribunals are substantially less effective than most domestic courts,” largely because “[i]nternational tribunals lack a direct coercion mechanism to compel . . . appearance.” [FN17]

The same unanimity of opinion prevails as to the unenforceable character of decisions by international tribunals. Professor Posner says that “when international courts issue judgments, they have no means to enforce them,” [FN18] and goes on to claim that “domestic courts depend on enforcement by the executive branch or enforcement arm of the government; . . . there is no such international enforcement agency on which courts can depend . . . . States may voluntarily *787 comply with judgments, and they sometimes do. But they need not.” [FN19] Despite their very different perspective, Professors Slaughter and Helfer again agree: “International tribunals lack a direct coercion mechanism to compel . . . compliance,” and “[i]nternational tribunals lack a direct coercion mechanism to compel . . . appearance.” [FN20] Professor Andrew Guzman concludes, even more pointedly, that

[i]n the context of a domestic dispute, the failure of a losing party to comply with the ruling of a court . . . leads to sanctions--most typically a seizure of property or person. . . . In contrast, when a state loses before an international tribunal, no formal legal structure exists to enforce the ruling. The assets of the noncompliant state will not be seized, nobody will be arrested, and the state will not even lose its ability to file complaints. [FN21]

Proceeding from these premises, the conventional wisdom is that the principal function of international adjudication is to provide information to the parties, a function that international tribunals are supposedly better able to perform than the parties themselves. Thus, as Professor Posner puts it, “[I]nternational tribunals [are] practical devices for helping states to resolve limited disputes when the states are otherwise inclined to settle them.” [FN22] International courts only “help resolve bargaining failures between states by providing (within *788 limits) information in (within limits) an impartial fashion.” [FN23] And, more starkly, “Adjudication itself only adds information.” [FN24]

Professor Guzman adopts a similar view, declaring that “[i]nternational tribunals are simply tools to produce a particular kind of information.” [FN25] He concludes that, in international adjudication, “the tribunal simply announces the relevant legal rules and, in the context of those rules, its interpretation of events,” with “[i]ts sole contribution to the dispute [being the
provision of] information concerning what happened, what law governs, and how the law applies to the facts.” [FN26] Put simply, “tribunals serve to provide information.” [FN27]

Likewise, Professors Slaughter and Helfer emphasize “the informational functions that international tribunals perform and their effect on a state's reputation for honoring its promises to other nations” [FN28] and link international tribunals' effectiveness to their “ability to provide information to, and hence empower, domestic political actors.” [FN29] In particular, they argue that “[in]dependent tribunals act as trustees to enhance the credibility of international commitments in specific multilateral contexts” by “raising the probability that violations of those commitments will be detected and accurately labeled as noncompliance.” [FN30]

Despite this agreement on the basic characteristics of contemporary international tribunals, the commentary on international adjudication nevertheless diverges widely in its analysis of the consequences of these descriptions. The focus of the academic debate is on the efficacy of international adjudication--starting from the premise that the decisions of international tribunals are nonmandatory and unenforceable. For skeptics about international law, such as Professors Posner and Yoo, international adjudication has been relatively unimportant, playing only a minimal role in international affairs. Professor Posner's statement that *789 “[a]djudication today remains marginal to world affairs” is representative of this view. [FN31] Professors Posner and Yoo describe states as having created a succession of tribunals, none of which they ultimately are willing to use or, if they do use them, to obey. [FN32]

In contrast, for Professors Slaughter and Helfer, and for other proponents of international adjudication, international tribunals play significant roles in contemporary international affairs, notwithstanding their lack of mandatory jurisdiction and enforcement power. They claim that states are “setting up more independent tribunals and quasi-judicial review bodies and using them more frequently.” [FN33] They postulate that this is because such tribunals increase the likelihood that violations of international law will be identified and, in turn, that the accurate labeling of violations will lead to higher probabilities of reputational or other costs for parties that have breached their obligations. [FN34] Because adjudication thereby enhances the credibility of international commitments, “states all over the world, presumably acting in their rational self-interest, are proliferating . . . independent tribunals and sending more and more cases to the ones they already established.” [FN35] At the same time, international tribunals are contributing to a “dense web of relations that constitutes a new, transgovernmental order,” [FN36] creating constituencies within states for compliance with international law. Despite the absence of mandatory jurisdiction and the lack of enforceable decisions, proponents of international adjudication nonetheless see international tribunals as playing important roles in contemporary international affairs and as contributing materially to securing compliance with international law.

These views of contemporary international adjudication inform prescriptions for future international tribunals. Thus, skeptics about *790 international adjudication argue that states will use international tribunals only if those tribunals are both powerless and “dependent” on the parties--in the sense of being chosen by the parties for specific cases, subject to a high degree of control by the parties, and lacking meaningful enforcement power. [FN37] In their view, “International courts succeed best when they are subject to strict limitations--voluntary jurisdiction, limited jurisdiction, weak remedies and so forth.” [FN38]

In direct contrast, proponents of international adjudication claim that international tribunals will be effective only if they are “independent,” exercising broad jurisdiction and being composed of standing panels of tenured judges; if they provide
private parties with access to adjudicatory proceedings; and if they are “embedded” in the domestic legal systems of participating states. [FN39] Proponents urge that international adjudicatory mechanisms should be structured “more like . . . court[s]” [FN40] and, in particular, more like “independent” courts such as the European Court of Justice (ECJ) and the European Court of Human Rights (ECHR). To that end, they propose a catalogue of structural and other features, derived from the ECJ's institutional design, as a model for both designing future international tribunals and restructuring existing international bodies. [FN41]

In sum, there is broad disagreement among commentators about both the efficacy and significance of contemporary international adjudication and about prescriptions for the design of future international tribunals. Skeptics claim that international adjudication has, and can only have, a very limited role in contemporary international affairs; they argue that future international tribunals should be “dependent” and relatively powerless because states will *791 use only ineffectual forms of adjudication. In contrast, proponents claim that international adjudication has significant effects on state behavior and that future international tribunals should be modeled on “independent” and relatively powerful national courts. Regardless of their conclusions, however, virtually all commentators start from the shared premise that, in contrast to national courts, international tribunals lack the power to issue enforceable decisions or to exercise compulsory jurisdiction and then focus their debate on whether and how such unenforceable decisions nonetheless affect state behavior. With this commentary in mind, it is useful to turn to the history and practice of contemporary international adjudication, focusing on developments over the past century.

II. Two Generations of International Adjudication

Commentary on contemporary international adjudication rests on an incomplete and therefore distorted premise. It is correct that an important set of international tribunals has the characteristics described by most commentary: traditional public-international-law tribunals like the Permanent Court of International Justice (PCIJ) and the ICJ lack both compulsory jurisdiction and the power to render enforceable decisions. It is therefore plausible to describe these traditional tribunals as simply “providing information” to disputants--and, more broadly, to the international community--to facilitate responses based on reciprocity, retaliation, or other actions. [FN42]

*792 It is not correct, however, that all international tribunals conform to the description provided by conventional wisdom: in reality, international adjudication is more complex and more interesting. Over the past four decades, states have developed an important new category of international adjudication-- composed of tribunals with characteristics that differ markedly from those of traditional international adjudicatory mechanisms. Although it has been largely ignored by the commentary on international adjudication, this new generation of tribunals has precisely those essential characteristics denied by the conventional wisdom--the power to render enforceable decisions and, in many cases, to exercise what is effectively, although not formally, compulsory jurisdiction over defined categories of disputes.

As this Part explains, states have developed two basic models of international adjudication. In general terms, these two models have developed chronologically, with an earlier generation of standing international courts aspiring to broad jurisdiction over classic public-international-law disputes and the later generation of much more specialized tribunals, usually constituted on a case-by-case basis, exercising relatively narrow jurisdiction over particular categories of international disputes. [FN43] Importantly, while first-generation tribunals have never been given the power to render enforceable decisions, *793 second-generation tribunals have almost always been granted, and subsequently have exercised, precisely this authority.
The debate among commentators about international adjudication—which focuses on first-generation tribunals—ignores a critically important category of substantially more active, more effective, and more interesting international adjudicatory mechanisms that have developed over the past four decades. In particular, the commentary has devoted little or no attention to a newer generation of tribunals—a generation that includes arbitral tribunals constituted pursuant to investment treaties, such as NAFTA and the ICSID Convention; international commercial-arbitration tribunals, such as the Iran-U.S. Claims Tribunal and the UN Claims Commission; the WTO; and national courts adjudicating claims against foreign states.

The origins of this newer generation of tribunals differ markedly from those of traditional forms of international adjudication. Second-generation tribunals were not the creations of multilateral conferences with high aspirations of securing world peace—like the Hague Conferences or the UN Conference—but instead evolved progressively from a multitude of practical, ad hoc arrangements, often involving bilateral relationships between states or between private parties and state entities, and typically concerning trade or investment. These arrangements were part of an incremental and pragmatic evolution of adjudicatory mechanisms aimed at providing improved means of impartially, efficiently, and effectively resolving disputes, particularly those disputes that impeded the development of international trade and investment. As discussed in the following Sections, these kinds of mechanisms have been used much more frequently and, for the most part, have worked much more effectively than traditional first-generation tribunals.

The success and frequent use of second-generation tribunals have significant implications for the analysis of contemporary international adjudication. These phenomena bear directly on conclusions about the efficacy and importance of international adjudication and, hence, about the resources and attention that should be devoted to designing and using adjudicatory mechanisms. They also are directly relevant to prescriptions for the design of future international tribunals.

1. Efficacy and Importance of International Adjudication. The success of second-generation tribunals directly contradicts central claims by skeptics about the efficacy and value of international adjudication and, more broadly, international law. It is wrong to conclude, as Professors Posner, Yoo, and others do, that

*868 the proliferation of international courts is a sign of the weakness of the international system, not its strength. . . States set up courts and then find they cannot control them. Rather than submitting to their jurisdiction, they set up even more courts or more arbitration panels--ones that they think they can control. [FN371] It is also wrong to conclude that “[a]djudication today remains marginal to world affairs.” [FN372]

On the contrary, the development of second-generation tribunals has entailed states' devoting substantial effort to creating new forms of international adjudication that are more, not less, effective—including forms of enforceable, effectively
compulsory adjudication. It has also involved states' then using, not ignoring, those dispute-resolution mechanisms in a very substantial number of cases, particularly as compared with other forms of international adjudication--again, notwithstanding the fact that these mechanisms produce enforceable results. Moreover, in many circumstances, such as investment and commercial arbitration, foreign-sovereign-immunity litigation, and claims-settlement tribunals, states have created adjudicatory mechanisms that private parties--not just states--can use, taking the ability to determine whether or not to use these mechanisms out of state control.

None of these developments conform to the image of ineffective, marginal international adjudication ignored by states, an image that is central to skeptics' evaluations of the field. Instead, states have created an almost entirely new generation of tribunals, vesting them with the power to issue peculiarly effective, enforceable decisions, often at the behest of private parties, and have then made frequent use of those tribunals. This is exactly the opposite of what Professor Posner's, Professor Yoo's, and other critics' analyses claim. The frequent use and efficacy of these second-generation tribunals provide compelling evidence of the success of international adjudication and, more generally, of international law itself. [FN373]

*869 2. Models for Future International Tribunals. The frequent use and success of second-generation tribunals also have important implications for the design of contemporary international adjudicatory bodies. The success indicates that the structure of these forms of adjudication deserves at least the same attention as traditional first-generation tribunals; indeed, the evidence suggests that second-generation tribunals will often provide a more attractive and effective model than traditional adjudicatory mechanisms for future forms of international adjudication.

Nevertheless, most commentary has not regarded second-generation tribunals as helpful models for future international adjudicatory bodies. On the one hand, proponents of international adjudication argue that there is a “growing global consensus that adjudicatory bodies outside the nation state should be independent.” [FN374] These commentators contend that international adjudicatory bodies should be structured “more like . . . court[s]” [FN375]--particularly, more like independent appellate courts such as the ECJ. [FN376] On the other hand, skeptics of international adjudication take the opposite tack, arguing that “[i]nternational courts succeed best when they are subject to strict limitations--voluntary jurisdiction, limited jurisdiction, weak remedies, and so forth.” [FN377]

Neither of these prescriptions can be reconciled with the frequent use and success of second-generation tribunals over the past three decades. That success weighs strongly against using idealized conceptions of either independent courts or purely dependent tribunals as the exclusive models for international tribunals.

As discussed, virtually all first-generation tribunals have enjoyed very limited success--apart from the ECJ, which is a regional European exception with limited relevance in other international settings. [FN378] The record of first-generation tribunals stands in stark *870 contrast to the experience with second-generation tribunals, which have witnessed substantial and continuing usage and notable success--both in resolving individual disputes and in playing essential systemic roles in contemporary international affairs. [FN379] Although the model of traditional first-generation adjudication may have useful applications in some circumstances, such as within some regional integration efforts, the structure and design of second-generation tribunals offer at least an equally--and often materially more--promising prospect as a model for most future international adjudicatory bodies.

Conversely, the success of second-generation tribunals also argues against prescriptions for entirely dependent adjudica-
tory mechanisms that are wholly subject to the state parties' control and that lack any enforcement authority. As discussed, second-generation tribunals have flourished, notwithstanding their power to render enforceable decisions, including decisions at the behest of private parties. Indeed, the success and frequent use of second-generation tribunals are partially attributable precisely to the enforceable character of their decisions, which enables states to make highly credible commitments and allows both states and private parties effectively to enforce those commitments.

Moreover, although the structures and procedures of second-generation tribunals have numerous elements of dependence, they also have important aspects of independence. In particular, second-generation tribunals share a number of institutional characteristics that differ from both “independent” first-generation tribunals and purely “dependent” tribunals. Thus, second-generation tribunals have: (a) been granted limited jurisdictional and remedial competence, ordinarily only the power to award monetary relief; (b) been utilized in individual cases, with substantial involvement of the parties; and (c) applied adjudicatory procedures that are aimed at efficient, effective factfinding, that are tailored to particular parties and cases, and that are frequently combined with some form of limited appellate review. These characteristics are most apparent with international commercial- and investment-arbitration tribunals and claims-settlement bodies, but can also be observed, less consistently, in WTO proceedings and foreign-sovereign-immunity litigation in national courts.

First, as discussed, the jurisdiction of international commercial- and investment-arbitration tribunals is defined narrowly and with considerable specificity by the arbitration provisions of either a commercial agreement, a bilateral treaty, or another document. [FN380] Claims-settlement tribunals exercise comparably limited, determinate jurisdiction. [FN381] The WTO is similar, with the panel's and the Appellate Body's competence limited to interpretation of specified WTO agreements [FN382] and their interpretive discretion constrained by both the detailed character of the agreements and the formal prohibitions in the WTO DSU. [FN383] These aspects of second-generation adjudication contrast markedly with the sweeping aspirations and broad compulsory jurisdiction of traditional first-generation tribunals, features that are also characteristic of independent national courts. [FN384]

A related aspect of the limited jurisdiction of second-generation tribunals is the remedies they may grant. The ICSID Convention limits the obligation of contracting states to enforce awards to the pecuniary aspects of such awards. [FN385] Similarly, the enforcement of awards under BITs, NAFTA, and the New York Convention is either formally or effectively limited to monetary enforcement against a foreign state's assets. [FN386] Enforcement of WTO decisions is also effectively monetary in character, taking place through the imposition of trade sanctions within specified financial limits. [FN387] Again, this contrasts with the putatively broad remedial jurisdiction of the ICJ, the ITLOS, and other first-generation tribunals. [FN388]

The limited jurisdictional and remedial competence of second-generation tribunals contrasts with the calls for independent international tribunals modeled on either the ICJ or domestic appellate courts and exercising broad competence. Indeed, the success of second-generation adjudicatory mechanisms with limited, specifically defined jurisdictional mandates recommends exactly the opposite approach toward tribunals' competence. At the same time, the success of second-generation tribunals that have been authorized to issue enforceable decisions at the behest of private parties also contrasts with competing prescriptions that international tribunals should be weak, ineffective, and subject to state control.

A second and related structural characteristic of second-generation tribunals concerns the selection of decisionmakers. Enforceable adjudicatory mechanisms have generally been accepted only when tribunals are selected for specific cases, with
substantial involvement of the parties. This has typically resulted in tribunals that are, in the terminology of most commentators, relatively dependent on the parties to a dispute. [FN389]

Thus, in commercial arbitrations, there is no standing decisionmaking body; parties to disputes instead choose tribunals on an ad hoc basis, and jurisdiction is limited to particular cases. In practice, parties ordinarily agree upon the identities of the members of three-person tribunals, often with each party nominating a co-arbitrator and the two co-arbitrators selecting the presiding arbitrator--failing which, an appointing authority will do so. [FN390] Similarly, in investment arbitrations, tribunals are selected on an ad hoc, case-by-case basis, through appointment procedures identical to those in commercial arbitrations. [FN391] WTO panels are selected on a broadly similar, case-by-case basis, with the parties free to agree upon the composition of the panels in particular cases, and the Dispute Settlement Body (DSB) selecting panels in the absence of party agreement. [FN392] All of these procedures differ materially from the ideal of independent standing judiciaries prescribed for international tribunals by many contemporary commentators. [FN393]

At the same time, however, various forms of second-generation adjudication also provide for limited forms of appellate review of first-instance decisions, often by tribunals with a measure of independence from the parties. This type of review exists in ICSID investment arbitrations, [FN394] WTO proceedings, [FN395] and NAFTA Chapter 19 proceedings. [FN396] These mechanisms combine first-instance tribunals that are highly dependent in most respects with a review tribunal that exercises very limited jurisdiction and whose members enjoy a higher--but still limited--degree of independence. Again, this structure contrasts with both blanket calls for independent international tribunals and similar prescriptions for entirely dependent tribunals.

A third structural aspect of second-generation tribunals concerns the procedures they apply, particularly for factfinding. The procedural and factfinding regimes in international commercial and investment arbitrations have been designed to satisfy users' expectations--including those of state parties--and, at the same time, to provide mechanisms for addressing dissatisfaction, both systemically and in specific cases. [FN397] Thus, most international arbitrations are conducted pursuant to institutional rules that provide a comparatively skeletal procedural framework, allowing the parties substantial freedom to participate in the design of procedures tailored to particular parties and disputes. [FN399]

The procedures in most second-generation tribunals have been designed to facilitate the effective presentation and evaluation of factual evidence. Both commercial and investment arbitrations typically involve substantial factfinding, including the examination of witnesses in direct and cross-examination, mandatory disclosure of documents, and evaluation of expert evidence. [FN400] The same is true of the Iran-U.S. Claims Tribunal and WTO panels, which involve procedures broadly similar to those in commercial and investment arbitrations. [FN401]

Again, the procedures in these second-generation settings differ materially from the procedures in traditional international adjudications, as well as in purely dependent tribunals. The procedures used in most first-generation tribunals are a standing set of generally applicable rules that are drawn up in a multilateral setting in which the need to satisfy a wide range of very different procedural expectations produces a lowest-common-denominator approach, and that are applied by large tribunals of a dozen or more senior jurists modeled on national appellate courts. Not surprisingly, these procedures are typically ineffective when used for factfinding. For example, “hearings” in the ICJ involve three hours of sitting per day, during which counsel read prepared submissions to a fifteen-person tribunal that virtually never asks questions. [FN402] Moreover, compelled disclosure from counterparties is essentially unknown, [FN403] and witness testimony and examination is equally
rare. [FN404] Other first-*876 generation tribunals also provide minimal opportunities for effective factfinding. [FN405]

In all of these respects, second-generation tribunals share a number of vital institutional characteristics and procedures that differ substantially from both their independent first-generation counterparts and from prescriptions for purely dependent tribunals. Given the striking success of second-generation tribunals, it is both appropriate and necessary to consider whether these characteristics provide attractive, effective models for future forms of international adjudication.

Addressing this question raises issues that are beyond the scope of this Article and that are the subjects of a forthcoming companion piece. [FN406] Among other things, the subject requires more detailed consideration of the structures and procedures that states have used for existing second-generation tribunals; the particular settings in which such tribunals have successfully been used; and the questions whether second-generation structures could be used in new settings, and, if so, which ones. As discussed, second-generation tribunals have been used only in relatively specific contexts, principally concerning trade and investment, and have been subject to significant structural conditions. It may be that second-generation structures are ill suited for other settings or, conversely, that they can be applied much more *877 widely. It may also be that different tribunals, with different institutional designs, are appropriate in different settings.

The essential point for present purposes, however, is that the consideration of models for international adjudication cannot properly be limited to traditional first-generation tribunals, based on independent national appellate courts, or limited to prescriptions for purely dependent tribunals. Instead, models for future international tribunals should also look to the carefully designed, distinctive structures and procedures of second-generation tribunals. It is these tribunals that have achieved the most frequent usage and the most successful application of international law in the late twentieth and early twenty-first centuries, and it makes no sense for their model to continue to be ignored in discussions of contemporary international adjudication.

Conclusion

The past forty years have seen the development of a new generation of international tribunals, best represented by international commercial- and investment-arbitration tribunals. Unlike traditional public-international-law tribunals, these second-generation tribunals issue enforceable decisions and exercise what is effectively compulsory jurisdiction. They have also been the most frequently used and, in many respects, most successful form of international adjudication in recent decades. Among other things, second-generation tribunals have played vital roles in international trade, finance, and investment; have contributed to the development of important fields of international law; and have provided leading contemporary examples of international law working in practice.

The success and frequent usage of second-generation tribunals have important implications for analysis of international adjudication. They contradict claims that international adjudication is marginal and unimportant in contemporary international affairs and that states do not use international tribunals, particularly tribunals that are effective. In fact, second-generation tribunals have been widely and successfully used, in part precisely because they issue effective and enforceable decisions.

At the same time, the widespread usage and success of second-generation tribunals also contradict prescriptions that future international tribunals be modeled on independent first-generation tribunals, national courts, or, alternatively, on entirely
dependent *878* tribunals. Instead, successful second-generation tribunals exhibit a blend of structural characteristics that contradict blanket prescriptions for independence and that instead counsel in favor of more tailored, nuanced institutional designs of future international tribunals than existing prescriptions contemplate.

[FN1]. Author of International Commercial Arbitration (2009), International Arbitration: Cases and Materials (2010), and International Civil Litigation in United States Courts (5th ed. 2011). I benefited from the thoughtful comments of Andrea Bjorklund, Laurence Helfer, Julian Davis Mortenson, Eric Posner, Michael Reisman, Catherine Rogers, Bo Rutledge, Stephen Schwebel, Paul Stephan, and Anne van Aaken. Able research assistance was provided by Sarah Ganslein and Jeremie Kohn. All mistakes are my own.

[FN2]. Thomas Buergenthal, Proliferation of International Courts and Tribunals: Is It Good or Bad?, 14 Leiden J. Int'l L. 267, 267 (2001); see also Cesare P.R. Romano, The Proliferation of International Judicial Bodies: The Pieces of the Puzzle, 31 N.Y.U. J. Int'l L. & Pol. 709, 709 (1999) (“When future international legal scholars look back at international law and organizations at the end of the twentieth century, they probably will refer to the enormous expansion and transformation of the international judiciary as the single most important development of the post-Cold War age.”); Stephen M. Schwebel, The Proliferation of International Tribunals: Threat or Promise?, in Judicial Review in International Perspective 3, 3 (Mads Andenas & Duncan Fairgrieve eds., 2000) (“The creation of new international judicial bodies is fundamentally a positive development, welcome rather than worrisome. It reflects the vitality and relative maturity of today’s international life.”).

[FN3]. See, e.g., Wolfgang Friedmann, The Changing Structure of International Law 141 (1964) (“[T]he role of international courts and tribunals in the evolution of international law is still a modest one.”).


[FN5]. Buergenthal, supra note 2, at 267.


[FN7]. Eric A. Posner & John C. Yoo, Judicial Independence in International Tribunals, 93 Calif. L. Rev. 1, 3 (2005); see also John Collier & Vaughan Lowe, The Settlement of Disputes in International Law 2 (1999) (“International conflict led, for example, to the refinement of new rules ... just as clearly as successive disputes have seen the confirmation of basic rules ....”); Guzman, supra note 1, at 173 (“International dispute resolution and international tribunals are all the rage. On the one hand, many international lawyers celebrate them as a powerful tool in the effort to bring order to our anarchic world. On the other hand, critics view these tribunals-- perhaps inconsistently-- as both a threat and a waste of resources.” (footnotes omitted)); Bruno Simma, International Adjudication and U.S. Policy--Past, Present, and Future, in Democracy and the Rule of Law 39, 39 (Norman Dorsen & Prosser Gifford eds., 2001) (“International courts and tribunals are proliferating, and the caseload of some of these institutions appears to explode.”).

[FN8]. The PICT, established by New York University and the University of London, maintains a list of international tribunals and a database of developments in the field of international adjudication. See Project on Int'l Courts & Tribunals, The International Judiciary in Context (2004), available at http://www.pict-pcti.org/publications/synoptic_chart/synop_e4.pdf (“The purpose of this chart is to provide international legal scholars and practitioners with a compendium of all international judicial bodies.”). The PICT list includes both “international courts”--defined as permanent bodies of independent judges-- and other international “tribunals”--also termed “other Dispute Settlement Bodies.” Id. The PICT list, presented in chart form, includes the Permanent Court of International Justice (PCIJ), ICJ, ITLOS, WTO, International Criminal Court (ICC)
and specialized criminal tribunals, and European Court of Justice (ECJ) and other regional judicial bodies. It also includes arbitral tribunals constituted under the auspices of the PCA, North American Free Trade Agreement (NAFTA), International Centre for the Settlement of Investment Disputes (ICSID), and Court of Arbitration for Sport, along with claims-settlement tribunals such as the Iran-U.S. Claims Tribunal and the UN Compensation Commission (UNCC). Id. [FN9]. Commentators typically define international adjudication as including not only entities officially designated “courts,” such as the [ICJ], but also less formal or permanent bodies established to resolve specific disputes .... Examples include panels convened under the 1947 General Agreement on Tariffs and Trade (GATT), dispute settlement procedures available under various environmental treaties, the underutilized [PCA], and ad hoc interstate arbitration tribunals.

Helfer & Slaughter, supra note 6, at 285 n.35; see also Keohane et al., supra note 4, at 457 n.1 ("By the strictest definition, there are currently seventeen permanent, independent international courts. If we include some bodies that are not courts, but instead quasi-judicial tribunals, panels, and commissions charged with similar functions, the total rises to over forty."); Ernst-Ulrich Petersmann, Constitutionalism and International Adjudication: How To Constitutionalize the U.N. Dispute Settlement System?, 31 N.Y.U. J. Int'l L. & Pol. 753, 753 n.2 (1999) (“WTO dispute settlement panels, like the dispute settlement mechanisms of the U.N. Law of the Sea Tribunal ..., are successful examples of legally binding adjudication of international disputes among states.").

Other commentators adopt similarly broad definitions of international adjudication, including such bodies as the PCA, PCIJ, ICJ, ITLOS, WTO, ICC, ECJ, European Court of Human Rights (ECHR), UN Human Rights Council (UNHRC), and national courts hearing international disputes. See, e.g., Eric A. Posner, The Perils of Global Legalism 150 (2009) (giving numerous examples of international judicial bodies); Robert E. Scott & Paul B. Stephan, Limits of Leviathan: Contract Theory and the Enforcement of International Law 33 (2006) ("A range of institutions, both national and international, can...apply [customary international law] to the disputes before them."); José E. Alvarez, The New Dispute Settlers: (Half) Truths and Consequences, 38 Tex. Int'l L.J. 405, 407 (2003) (“International adjudication, like its domestic counterpart, is routinely seen as involving four basic elements: (1) independent judges applying (2) relatively precise and pre-existing legal norms after (3) adversary proceedings in order to achieve (4) dichotomous decisions in which one of the parties clearly wins."); Guzman, supra note 1, at 185 (“[A] broader definition is appropriate. Thus, a tribunal is defined here as a disinterested institution to which the parties have delegated some authority and that produces a statement about the facts of a case and opinions on how those facts relate to relevant legal rules."); Harold Hongju Koh, Transnational Public Law Litigation, 100 Yale L.J. 2347, 2371 (1991) (identifying five factors that characterize transnational litigation); Jenny S. Martinez, Towards an International Judicial System, 56 Stan. L. Rev. 429, 430 (2003) (“[T]here are now more than fifty international courts, tribunals, and quasi-judicial bodies....”); W.M. Reisman, The Enforcement of International Judgments, 63 Am. J. Int'l L. 1, 1 n.1 (1969) ("In international law, in fact, the term adjudication has been used generally to refer to any process of peaceful dispute settlement."). [FN10]. All of the various types of international tribunals, broadly defined, interpret and apply principles of international law, both public and private, to disputes involving one or more persons, states, or state entities. These tribunals also all perform the familiar adjudicative functions of dispute resolution, review of the legality of government actions against either a contractual treaty or other international legal rules, and enforcement. See Karen J. Alter, Delegating to International Courts: Self-Binding vs. Other-Binding Delegation, 71 Law & Contemp. Prosbs. 37, 41 (2008) (defining the four roles of court systems as “dispute-adjudication,” “enforcement,” “administrative review,” and “[c]onstitutional review” (emphasis omitted)). [FN11]. For example, interstate boundary disputes can be submitted, variously, to the ICJ, to ad hoc interstate or commercial arbitral tribunals, to regional courts, to conciliation mechanisms, and to national courts. See Aman Mahray McHugh, Comment, Resolving International Boundary Disputes in Africa: A Case for the International Court of Justice, 49 How. L.J. 209, 239 (2005) (discussing the potential alternatives to boundary-dispute resolution by the ICJ, including resort to other courts, arbitral tribunals, and negotiation). Similarly, expropriation claims by or on behalf of foreign investors can be submitted,
again variously, to the ICJ, to international commercial arbitration, to investment arbitration, to claims-settlement tribunals, or to national courts. Steven R. Ratner, Regulatory Takings in Institutional Context: Beyond the Fear of Fragmented International Law, 102 Am. J. Int'l L. 475, 479-80 (2008).

[FN12]. Posner & Yoo, supra note 7, at 17; see also, e.g., Guzman, supra note 1, at 179 (“[A court's] sole contribution to the dispute is information concerning what happened, what law governs, and how the law applies to the facts.”). Professors Robert Scott and Paul Stephan are a partial exception. They distinguish “legalized, institutionally based, privately initiated mechanisms from the traditional informal means of enforcement that remain subject to state control,” and they include investment and commercial arbitral tribunals, some claims-settlement tribunals, and some national courts in the “formal enforcement” category. Scott & Stephan, supra note 9, at 4; see also infra note 320 and accompanying text.

[FN13]. Posner, supra note 9, at 34; Posner & Yoo, supra note 7, at 6-7; see also George W. Downs & Michael A. Jones, Reputation, Compliance, and International Law, 31 J. Legal Stud. S95, S98 (2002) (“This means that even in an increasingly integrated international system, reputational concerns cannot by themselves begin to ensure a high level of compliance with every international agreement.”).

[FN14]. Posner, supra note 9, at 33; see also Posner & Yoo, supra note 7, at 13 (“International tribunals are more like domestic arbitrators than domestic courts because nothing prevents disputants from ignoring them if they do not believe that submitting disputes to tribunals serves their interest.”).

[FN15]. Posner, supra note 9, at 33.

[FN16]. See, e.g., Guzman, supra note 1, at 174 (“These institutions are important to the international legal system. To begin with, they are a useful tool for the peaceful settlement of disputes.”); Helfer & Slaughter, supra note 6, at 300-36 (using a multifactor checklist to describe the authors' conception of what qualities are important in an international judicial body); Laurence R. Helfer & Anne-Marie Slaughter, Why States Create International Tribunals: A Response to Professors Posner and Yoo, 93 Calif. L. Rev. 899, 904 (2005) (“The benefits that states derive from independent tribunals far exceed the provision of information to the disputing parties.”); Keohane et al., supra note 4, at 457 (“What transnational dispute resolution does is to insulate dispute resolution to some extent from the day-to-day political demands of states.”); see also Scott & Stephan, supra note 9, at 115 (“To say that the WTO [Dispute Settlement Body], the ICJ, and the ITLOS embody informal enforcement of international obligations is not to argue that they are ineffectual.... [I]nformal enforcement may provide robust, and in some circumstances, optimal, incentives for cooperation.”); Kenneth W. Abbott & Duncan Snidal, Hard and Soft Law in International Governance, 54 Int'l Org. 421, 456 (2000) (“In this light, we argue vigorously against those who discount international legalism because its a little too soft.”); Harold Hongju Koh, Why Do Nations Obey International Law?, 106 Yale L.J. 2599, 2569 (1997) (“Participation in transnational legal process creates a normative and constitutive dynamic. By interpreting global norms, and internalizing them into domestic law, that process leads to reconstruction of national interests, and eventually national identities.”); Martinez, supra note 9, at 528 (describing two possible views of the international judiciary--one motivated by a traditional definition and one based on complexity theory).

[FN17]. Helfer & Slaughter, supra note 6, at 285. The same scholars conclude that contemporary international tribunals lack the “power to compel a party to a dispute to defend against a plaintiff's complaint.” Id. at 283.

[FN18]. Posner, supra note 9, at 33; see also Posner & Yoo, supra note 7, at 13 (“By contrast, international tribunals do not operate as part of a coherent and unified world government. They exist in an interstitial legal system that lacks a hierarchy, an enforcement mechanism, and a legislative instrument that allows for centralized change.”).

[FN19]. Posner, supra note 9, at 34; see also Posner & Yoo, supra note 7, at 13.

[FN20]. Helfer & Slaughter, supra note 6, at 285-86.

[FN21]. Guzman, supra note 1 at 178-79; see also Abbott & Snidal, supra note 16, at 426 (“[I]nternational regimes do not even attempt to establish legal obligations centrally enforceable against states.”); Alvarez, supra note 9, at 416 (“As is well known, the Security Council has chosen to enforce only one ICJ decision in its history--against Libya and only with that
state's concurrence."); Peter H. Kooijmans, The International Court of Justice: Where Does It Stand?, in The International Court of Justice: Its Future Role After Fifty Years 407, 408 (A.S. Muller, D. Rai & J.M. Thuránszky eds., 1997) (“These [states], which make up the system, are ... entities which do not recognize a higher authority ....”); Oscar Schachter, The Enforcement of International Judicial and Arbitral Decisions, 54 Am. J. Int'l L. 1, 6 (1960) (“For these reasons, a closer look at the problems of enforcement is warranted. Recent experience has revealed uncertainties and shortcomings that appear to call for clarification and remedial measures.”); Yuval Shany, No Longer a Weak Department of Power? Reflections on the Emergence of a New International Judiciary, 20 Eur. J. Int'l L. 73, 74 (2009) (“Not only did international courts have little influence over the sword and the purse, their jurisdictional powers tended to be limited in scope and marginalized in substance.”).

[FN22]. Posner, supra note 9, at 129; see also Posner & Yoo, supra note 7, at 17 (“[J]ust as a domestic court can reduce the transaction costs of writing contracts by enforcing the hypothetical optimal contract, an arbitrator can reduce the transaction costs of writing treaties by enforcing the hypothetical optimal treaty.”).

[FN23]. Posner, supra note 9, at 129; see also Posner & Yoo, supra note 7, at 17 (“The tribunal's function is to provide information.”).


[FN25]. Guzman, supra note 1, at 235.

[FN26]. Id. at 179.

[FN27]. Id.


[FN29]. Id. at 903.

[FN30]. Id. at 904.

[FN31]. Posner, supra note 9, at 132; see also Posner & Yoo, supra note 7, at 74 (arguing that new international tribunals will face “diminished chances of success”).

[FN32]. Posner, supra note 9, at 173; see also id. at 167 (“[T]he most plausible reason for the proliferation of courts [is that] states become unhappy with an existing international court, and they work around it by depriving it of jurisdiction and establishing additional courts or adjudication mechanisms as needed.”); Posner & Yoo, supra note 7, at 74 (“Our analysis suggests that [the ICC, the WTO, and the ITLOS] will have diminished chances of success, and the steps being taken by states to avoid or weaken their jurisdiction supports our claim.”).

[FN33]. Helfer & Slaughter, supra note 16, at 903.

[FN34]. Id. at 935.

[FN35]. Id. at 955.


[FN37]. Cf. Posner & Yoo, supra note 7, at 5-8, 72 (“Tribunals are likely to be ineffective when they neglect the interests of state parties and, instead, make decisions based on moral ideals, the interests of groups or individuals within a state, or the interests of states that are not parties to the dispute.”). Professors Posner and Yoo define the independence of international tribunals in the following terms: “A tribunal is independent when its members are institutionally separated from state parties - when they have fixed terms and salary protection, and the tribunal itself has, by agreement, compulsory rather than consensual jurisdiction.” Id. at 7.

[FN38]. Posner, supra note 9, at 173.

[FN39]. See, e.g., Keohane et al., supra note 4, at 458-59, 487-88 (“We define low independence, access, and embeddedness as the ideal type of interstate dispute resolution and high independence, access, and embeddedness as the ideal type of transnational dispute resolution.”); Helfer & Slaughter, supra note 16, at 908 (citing with approval the approach of Professors Keohane, Moravcsik, and Slaughter).

[FN40]. Helfer & Slaughter, supra note 6, at 365.
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[FN372] Posner, supra note 9, at 132.

[FN371] Posner & Yoo, supra note 7, at 173-74; see also id. at 167 (“[T]he most plausible reason for the proliferation of courts [is that] states become unhappy with an existing international court, and they work around it by depriving it of jurisdic
tion and establishing additional courts....”).

[FN43]. These forms of international adjudication involved the application of traditional rules of international law that formed the bulk of international-law obligations before World War II. See Koh, supra note 16, at 2607-13 (tracing the progre

[FN44]. A chronological account of first- and second-generation tribunals is broadly accurate. Most first-generation tribunals, including the PCA, PCIJ, and ICJ, developed between 1900 and 1950; in contrast, second-generation tribunals first began to develop in the 1960s and 1970s, following adoption of the restrictive theory of sovereign immunity and widespread ratification of the ICSID and New York Conventions. See infra Part II.B. It is true that the model first reflected by traditional first-generatio

[FN42]. Nonetheless, the “providing information” metaphor is flawed in important respects. It ignores the distinction between formally nonbinding adjudicatory decisions, such as reports by commissions of inquiry or mediators, and formally binding decisions, such as those of many international courts and arbitral tribunals, and implies that both have the same function and status-- namely, that of “providing information.” This implication is misleading.

International instruments frequently provide that commissions of inquiry, mediations, and conciliations are nonbinding. See, e.g., Convention for the Pacific Settlement of International Disputes art. 6, Oct. 18, 1907, 36 Stat. 2199, 2221, 1 Bevans 577, 586 (“Good offices and mediation ... have exclusively the character of advice, and never have binding force.”); id. art. 35, 36 Stat. at 2220, 1 Bevans at 591 (“The Report of the Commission is limited to a statement of facts, and has in no way the character of an Award. It leaves to the parties entire freedom as to the effect to be given to the statement.”). These are archetypal examples of tribunals whose purpose is solely, and expressly, to provide information.

In contrast, the same international instruments provide that arbitral awards, id. art. 37, 36 Stat. at 2220, 1 Bevans at 591; see also infra text accompanying notes 55-56, and international court judgments, see infra text accompanying note 88, are binding on the parties. The agreement by states that a tribunal's decision will be binding gives that decision a function and character that is vitally different from that of nonbinding information provided by third parties; in addition to providing information, which a commission of inquiry or mediator does, a binding decision imposes a specific and agreed upon obligation to comply with the decision of a neutral third party. A state's refusal to comply with such a decision entails a further noncompliance with its international obligations, beyond its initial violation of its underlying obligations. Moreover, this additional violation is generally unambiguous and unconditional; it is difficult for a state to explain its breach, for example, by reference to changed or extenuating circumstances or to its counterparty's conduct. As a consequence, noncompliance with a binding international decision generally entails materially increased costs beyond either breach of an underlying international obligation or a refusal to comply with a nonbinding recommendation. See Guzman, supra note 1, at 181-82 (“[In] dispute resolution at the WTO .... [w]rongdoers ... face both reputational and retaliatory consequences when they lose a case.”). Describing both binding and nonbinding decisions as merely providing information is unhelpful because it ignores, and impliedly rejects, this distinction and the special character of the information that is provided by a binding decision.

[FN41]. Id. at 298-337.
Conversely, international investment and commercial arbitration and WTO dispute resolution are subject to criticism precisely because of their significance to contemporary international affairs and the development of international law. See supra text accompanying notes 263-69.

Helfer & Slaughter, supra note 16, at 914; see also supra text accompanying notes 40-41.

Helfer & Slaughter, supra note 6, at 365; see also supra text accompanying notes 37-41.

Helfer & Slaughter, supra note 6, at 276 (“[The ECJ] perch[e] atop national governments and national law with no direct relationship to either.”); see also id. at 387 (noting the success of the ECJ in making up for its “lack of direct coercive power by convincing domestic government institutions to exercise power on [its] behalf”).

Posner, supra note 9, at 173.

See supra text accompanying notes 154-65. Although states have created significant numbers of nominally independent tribunals modeled on national appellate courts, such as the PCIJ, ICJ, ITLOS, and many regional courts, they have in practice made limited use of these tribunals. See supra text accompanying notes 65-68, 90-92, 103-06, 124-25.

See supra Part III.A.

See supra text accompanying notes 218-37. In the case of commercial-arbitration agreements, these provisions are typically included in commercial contracts and provide for arbitration of a defined category of future disputes—typically those “relating to” a particular contract. See 1 Born, supra note 197, at 1090 (listing the “limited number of fairly standard formulae used in arbitration agreements to describe the scope of such provisions”). In the case of investment arbitrations, many proceedings are conducted pursuant to traditional arbitration clauses covering future disputes in investment agreements. Newcombe & Paradell, supra note 195, §§ 1.31-.33 (“The traditional form of consent to arbitration between a foreign investor and a host state was through an arbitration clause in a contract ….”); Schreuer et al., supra note 220, at 356-62 (discussing the form and validity of concurrent arbitration clauses). Alternatively, the jurisdiction of tribunals is defined by the terms of a BIT, sometimes in conjunction with a further expression of state consent—in investment legislation or otherwise. See supra text accompanying notes 222-28.

See supra text accompanying notes 277, 281.

DSU art. 3(2) (noting that the WTO's dispute-settlement system “serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law”); Malcolm N. Shaw, International Law 1036 (6th ed. 2008) (explaining that the WTO has jurisdiction when “a member state considers that a measure adopted by another member state has deprived it of a benefit accruing to it directly or indirectly under the GATT or other covered agreements”); Trachtman, supra note 304, at 338, 342-43 (“The WTO dispute resolution system is clearly not a court of general jurisdiction, competent to apply all applicable international law.”); supra text accompanying notes 304, 313.

See supra text accompanying notes 304-04 and accompanying text.

See supra text accompanying notes 51-52, 81, 97-99.

See supra text accompanying notes 241-42.

See supra text accompanying notes 204-07.

See supra text accompanying notes 317-20.

A related feature of second-generation tribunals is that they typically apply comparatively specific legal rules, rather than indeterminate standards. See Gary Born, Designing Effective International Tribunals 1 (Sept. 27, 2011) (unpublished manuscript) (on file with the Duke Law Journal) (“States have generally rejected the ICJ's optional clause jurisdiction and have similarly declined to accept the ITLOS's general jurisdiction.”); supra text accompanying notes 229-37, 301-09.

See Helfer & Slaughter, supra note 16, at 942-54 (“[S]tates ... fine-tune their influence over the tribunal and its jurisprudential output using a diverse array of structural, political, and discursive controls.”); Posner & Yoo, supra note 7, at 7
(“[S]tates will be reluctant to use international tribunals unless they have control over the judges.”); cf. Helfer & Slaughter, supra note 6, at 300-01, 303-04, 312-14 (suggesting strategies for choosing jurists to attract claimants, stressing the importance of independent-factfinding capacity to a tribunal's authority, and emphasizing “the link between a supranational tribunal's authority and its neutrality” with respect to political interests).

[FN390]. See 1 Born, supra note 197, at 17, 1399 (“[I]n most jurisdictions, a party's failure to appoint an arbitrator in accordance with an ad hoc arbitration agreement permits its counter-party to apply for judicial appointment of the defaulting party's co-arbitrator.”).

[FN391]. See supra text accompanying notes 235-37.

[FN392]. See supra note 305.

[FN393]. See supra text accompanying notes 374-76.

[FN394]. ICSID arbitral awards--but not non-ICSID, BIT, or NAFTA awards--are subject to annulment on very limited grounds by annulment committees, selected by ICSID--not the parties--from a standing list of potential committee members. See supra note 237.

[FN395]. Broadly paralleling the ICSID structure, WTO panel reports are subject to limited appellate review by the WTO Appellate Body--a standing body from which the members of appellate tribunals in particular cases are selected. Although less dependent than arbitral tribunals, the WTO Appellate Body is more dependent than most first-generation tribunals, including the ICJ and the ITLOS; among other things, WTO Appellate Body members are chosen for relatively short four-year terms and are eligible for reappointment, which is coveted. See supra note 312 and accompanying text.

[FN396]. An appellate mechanism is provided by NAFTA's Extraordinary Challenge Committee, which can hear a limited range of challenges to NAFTA awards under Chapter 19. NAFTA, supra note 45, art. 1904(13), 32 I.L.M. at 688.

[FN397]. See supra text accompanying notes 203, 235-37, 264-68. Similar procedures are used in the Iran-U.S. Claims Tribunal and WTO panel proceedings. See supra text accompanying notes 280, 305-06.

[FN398]. Examples include the UNCITRAL Rules and the rules of leading arbitral institutions. See 1 Born, supra note 197, at 150-69 (outlining the rules of UNCITRAL and describing sixteen leading international-arbitration institutions).

[FN399]. See Kenneth S. Carlston, Procedural Problems in International Arbitration, 39 Am. J. Int'l L. 426, 448 (1945) (“Procedure is no unalterable course of conduct to which all tribunals must adhere. It should always be adapted to facilitate the course of the particular arbitration and to enable the economical accomplishment of its task within the time fixed.”); Laurent Lévy & Lucy Reed, Managing Fact Evidence in International Arbitration, 13 ICCA Int'l Arb. Congress 633, 644 (2007) (“[A]dopting formal guidelines...is unnecessary and counterproductive...[E]xtensive harmonization of procedural rules for witness testimony would not serve the interests of parties wishing to resort to international commercial arbitration.....”).


[FN402]. Cecily Rose, Questioning the Silence of the Bench: Reflections on Oral Proceedings at the International Court of Justice, 18 J. Transnat'l L. & Pol'y 47, 49 (2008) (“During the [ICJ] hearings, the Registrar and the fifteen judges of the ICJ ... sit in almost total silence in black robes behind a long bench.... [R]epresentatives ... address the bench virtually uninterrupted for several hours, usually by reading, verbatim, a prepared text distributed in advance to the judges.”); see also Alain Pellet, Remarks on Proceedings Before the International Court of Justice, 5 Law & Prac. Int'l Cts. & Tribunals 163, 181 (2006)
("Procedurally speaking,' the [ICJ] is not aging well." (footnote omitted)). But see 3 Shabtai Rosenne, The Law and Practice of the International Court, 1920-2005, at 1297, 1304 (4th ed. 2006) ("Although the Court does not usually interfere in the manner in which a case is pleaded, the faculty to put questions ... is regularly used."). See generally Anna Riddell & Brendan Plant, Evidence Before the International Court of Justice 308-11 (2009) (providing reasons for the lack of testimonial evidence in the ICJ).

[FN403]. Thomas M. Franck, Fairness in International Law and Institutions 336 (2002) ("[T]he ICJ has no procedures by which one party can compel the disclosure of evidence by the other, because compelled disclosure is inconsistent with the nature of sovereignty."); Crook, supra note 400, at 326 ("Tribunals in inter-state cases rarely encourage or require states to disclose documents or evidence to the other party ....").

[FN404]. See Crook, supra note 400, at 327 ("There have been few cases in which the [ICJ] has heard oral testimony ...."); Phillip C. Jessup, Foreword to Durward V. Sandifer, Evidence Before International Tribunals, at vii, x (rev. ed. 1975) ("Most of the evidence received by the [ICJ] is documentary ...."); cf. 3 Rosenne, supra note 402, at 1312-13 (summarizing the process of obtaining witness testimony in several cases); Rosalyn Higgins, The Desirability of Third-Party Adjudication: Conventional Wisdom or Continuing Truth?, in International Organizations: Law in Movement 37, 42-46 (J.E.S. Fawcett & Rosalyn Higgins eds., 1974) ("The evidence seems to be that, so far as fact-finding is essential to the weighing of any legal claims, fact-finding commissions are likely to be more effective than a judicial body.").

[FN405]. Traditional interstate arbitrations were historically conducted pursuant to procedures that closely resembled PCIJ and ICJ proceedings, albeit with less unwieldy tribunals that provided little room for the development of factual matters. See James Crawford, Advocacy Before the International Court of Justice and Other International Tribunals in State-to-State Cases, in The Art of Advocacy in International Arbitration 11, 12-13 (R. Doak Bishop ed., 2004) ("Since new evidence ... is generally inadmissible after the close of written pleadings, the notion of ‘development’ generally takes the form of recapitulation, emphasis and argument in the alternative."). The ITLOS's procedural rules and the composition of the tribunal, which consists of twenty-one members, closely parallel those of the ICJ and, if the tribunal is ever used to any appreciable extent, would likely produce comparable procedures. See UNCLOS, supra note 116, annex VI, art. 2, 1833 U.N.T.S. at 561 ("The Tribunal shall be composed of a body of 21 independent members ...."); id. annex VI, art. 13, 1833 U.N.T.S. at 564 ("[A] quorum of 11 elected members shall be required to constitute the Tribunal."); supra text accompanying notes 116-26. Similarly, regional courts, such as the ACJHR and CACJ, are also relatively large tribunals, again structured like appellate courts, which offer few opportunities for effective factfinding. See supra text accompanying notes 129-47.

[FN406]. Born, supra note 388.